

DELAWARE'S FAR-REACHING INFLUENCE ON CORPORATE LAW IN THE UNITED STATES AND ABROAD

Justice Randy J. Holland

- I. Randy J. Holland, **Delaware's Business Courts: Litigation Leadership**, 34 IOWA J. CORP. L. 771 (2009).

The introduction to this article states:

Many corporations have come to view courts as unwieldy, unpredictable purveyors of justice in the field of business litigation. But a mass exodus from the courts is not the answer; it is counter-productive for long-term business interests. The courts are uniquely equipped to address corporate concerns, and Delaware's court system provides a model that largely addresses modern corporate worries about courtroom litigation. Delaware's courts offer litigants a forum with an extensive and well-developed jurisprudence that creates predictability and expediency in adjudication, allowing for efficient business planning. Delaware's independent judiciary is essential to securing these values, and its practice of appointing judges and maintaining a balance of power between political parties on its high court has yielded dividends in both the expertise and independence of its judiciary. Delaware's continued preeminence in corporate law is contingent on not only the perception but the reality that the Delaware judiciary is engaged in principled decisionmaking. Corporations should not turn away from courts as dispute-resolution mechanisms, and Delaware provides a blueprint for how to succeed in bringing corporations back to the courts.

Within the corporate community, there has been an increased interest in arbitration and other forms of alternative dispute resolution due to ongoing concerns about negative experiences in the adjudication of business cases in some state courts. In seeking alternatives to litigation in state courts, corporations are looking for efficiency and economy from an impartial decision maker with expertise in business matters. Delaware's business courts not only provide all of those qualities, but their decisions are predictable and authoritative.

In 2008, for the seventh consecutive year, Delaware's judicial system ranked first among state courts for creating a fair and reasonable litigation environment by the State Liability Systems Ranking Study of the United States Chamber of Commerce Institute for Legal Reform. The results can be attributed to Delaware's three business courts: its Supreme Court and two major trial courts, the Superior Court and the Court of Chancery. The history of those trial courts was recently summarized in *Business Law Today* by two eminent Delaware jurists from each of those tribunals. A history of the Supreme Court was published in 2001 to commemorate its Golden Anniversary.

II. DELAWARE’S INFLUENCE IN THE UNITED STATES

a. Kansas

- i. Letter from William Quick, On Behalf of the Kansas Bar Association, to The Honorable Lance Kinzer and Members of the House Judiciary Committee (Feb. 2, 2012) (*available at* http://www.kslegislature.org/li/b2011_12/committees/misc/ctte_h_jud_1_20120202_04_other.pdf).
- ii. William Quick, on behalf of the Kansas Bar Association, sent a letter to the Kansas House Judiciary Committee opposing revisions to the Kansas LLC Act. In that letter, Mr. Quick noted that Kansas had modeled its corporation and LLC Acts on Delaware precedent for over 40 years. Kansas businesses know and expect Delaware law and principles to apply, and any shift from the Delaware standards would cause considerable business disruption. The letter went on to explain that business prefer Delaware’s legal environment because of how the Delaware courts handle business litigation. Accordingly, the only way Kansas can compete with this legal environment is by adopting and applying Delaware precedent. Further, the letter praised Delaware’s legislature for being responsive to business feedback, current events, and developments in national business law. The Delaware judiciary understands many of these same issues and concerns in adjudicating complex legal matters. Once again, the letter noted that the only way for another state—Kansas—to maintain its competitiveness in the business world is to adopt these same laws and precedents. By doing so, many local businesses aren’t forced to incorporate in Delaware and can avail themselves to the same protections under local, state law.

b. New York

- i. Business Court
- ii. National Law Journal – December 2012

c. Other states and federal courts

- i. Internal Affairs Doctrine – must apply Delaware law
- ii. Certification Procedure – to the Delaware Supreme Court
- iii. Voluntary Adoption of Delaware law

III. DELAWARE’S INFLUENCE ABROAD

- a. **Marshall Islands: §13. Construction; adoption of United States corporation law.** This Act shall be applied and construed to make the laws of the Republic, with respect to the subject matter hereof, uniform with the laws of the State of

Delaware and other states of the United States of America with substantially similar legislative provisions. Insofar as it does not conflict with any other provision of this Act, the non-statutory law of the State of Delaware and of those other states of the United States of America with substantially similar legislative provisions is hereby declared to be and is hereby adopted as the law of the Republic, provided however, that this section shall not apply to resident domestic corporations.

b. **Taiwan** - Delaware Cases

c. **Qatar** - Constitution Commercial Court

d. **Japan**

Jack B. Jacobs, **Implementing Japan's New Anti-Takeover Defense Guidelines, Part I: Some Lessons from Delaware's Experience in Crafting "Fair" Takeover Rules**, 2 N.Y.U.J.L. & BUS. 323 (2006).

e. **Canada**

Nicholas Dietrich, **Revlon Redux: Reconciling the BCE Case in Change of Control Transactions – Is Lyondell the Better Way?**, 10 BUS. L. INT'L 218 (2009).

f. **United Kingdom**

Albert O. "Chip" Saulsbury, **The Availability of Takeover Defenses and Deal Protection Devices for Anglo-American Target Companies**, 37 DEL. J. CORP. L. 115 (2012).

g. **Netherlands**

Danielle Quinn, **Dutch Treat: Netherlands Judiciary Only Goes Halfway Towards Adopting Delaware Trilogy in Takeover Context**, 41 VAND. J. TRANSNAT'L L. 1211 (2008).

h. **Australia**

Jennifer G. Hill, **Subverting Shareholder Rights: Lessons From News Corp.'s Migration to Delaware**, 63 VAND. L. REV. 1 (2010).

i. **European Union**

Christian Kirchner, Richard Painter & Wulf Kaal, **Regulatory Competition in EU Corporate Law After *Inspire Arts*: Unbundling Delaware's Product for Europe**, (forthcoming) (*available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=617681).

IV. RECENT DELAWARE SUPREME COURT CASES

Airgas Inc. v. Air Products & Chems. Inc. 8 A.3d 1182 (Del. 2010).

Background: Corporation which was target of takeover attempt brought action seeking a declaratory judgment that bylaw amendment which would accelerate the timing of corporation's annual meeting was invalid. Shareholder that proposed the bylaw filed

motion for judgment on the pleadings. The Court of Chancery, 2010 WL 3960599, granted shareholder's motion. Corporation appealed.

Holdings: The Supreme Court, Ridgely, J., held that: corporate charter required that each class of directors serve three year terms, and bylaw was inconsistent with charter and, thus, invalid.

The Bank of New York Mellon Trust Co. v. Liberty Media Corp. 29 A.3d 225 (Del. 2011)

Background: Corporation brought action seeking declaration that proposed splitoff would not trigger successor obligor provision in bond indenture. Following a bench trial, the Court of Chancery of the State of Delaware entered judgment for corporation. Trustee for bondholders appealed.

Holding: The Supreme Court, Holland, J., held that evidence was sufficient to establish that proposed splitoff was not sufficiently related to two prior spinoffs and one prior splitoff, and thus that the transactions could not be aggregated when determining whether successor obligor provision in bond indenture was triggered.

Central Laborers Pension Fund v. News Corp. 45 A.3d 139 (Del. 2012)

Background: Pension fund that purported to own shares of corporation brought action against corporation seeking to compel corporation to produce records related to its acquisition of another corporation in order to investigate potential breaches of fiduciary duty. The Court of Chancery, 2011 WL 6224538, dismissed action. Pension fund appealed.

Holding: The Supreme Court, Holland, J., held that pension fund failed to provide documentation supporting its assertion that it was a beneficial owner of stock in corporation as required for record inspection. Section 220 permits a stockholder to inspect books and records of a corporation if the stockholder complies with the procedural requirements of the statute and then shows a proper purpose for the inspection.³⁸ Section 220 requires a stockholder seeking to inspect books and records to first establish that such stockholder has complied with the form and manner of making demand for inspection of such documents.³⁹ Central Laborers has not made that showing. Because Central Laborers' Inspection Demand did not satisfy the procedural requirements of section 220, it did not establish its standing to inspect the books and records of News Corp. On that basis alone, and without reaching the issue of proper purpose, the judgment of the Court of Chancery is affirmed.

Americas Mining Corp v. Theriault 51 A.3d 1213 (Del. 2012)

Background: Minority shareholder brought derivative action against corporation alleging that controlling shareholder and directors breached their fiduciary duty of loyalty to the corporation and its minority shareholders by causing the corporation to acquire the controller's interest in a Mexican **mining** company for much more than it was worth. The Court of Chancery entered judgment in favor of minority shareholder, awarding more than \$2 billion in damages and more than \$304 million in attorneys' fees. Defendants appealed.

Holdings: The Supreme Court, Holland, J., held that:

- chancery court did not abuse its discretion by denying defendants' eleventh-hour request to modify the trial schedule;
- corporation's purchase of controlling interest in Mexican **mine**, which was owned by corporation's controlling shareholder was not entirely fair;
- court did not abuse its discretion in awarding damages based on the difference in value between what was paid for the **mining** company and the value of what the company was actually worth at the time; and
- court did not abuse its discretion in awarding a 15% attorney fee from common fund.

Gatz Properties v. Auriga Capital Corp. 2012 WL 6600299 (Del. 2012)

Background: Minority members in a limited liability company (LLC) brought breach of contract and breach of fiduciary duty action against company's member-manager, who was the majority interest holder, regarding sale of company at auction in which company was purchased by manager. The Court of Chancery, 40 A.3d 839, Strine, J., entered judgment in favor of minority members and awarded damages. Manager appealed.

Holdings: The Supreme Court held, per curiam, that:

- LLC agreement contractually adopted fiduciary duty standard of entire fairness;
- evidence was sufficient to support finding that manager breached contractually-adopted fiduciary duties;
- damages award of \$776,515 in favor of minority members was appropriate; and
- trial court acted within its discretion in awarding attorney fees to minority members.
- Unnecessary construction of LLC statute to provide default fiduciary duties

V. LLC'S—DEFAULT FIDUCIARY DUTIES

The current thinking of the Delaware Bar's Alternative Entity Committee upon default fiduciary duties is to revise 18-1104 as follows:

In any case not provided for in this chapter, the rules of law and equity, including **the applicable rules of law and equity relating to fiduciary duties** and the law merchant, shall govern.

Synopsis: The amendment to Section 18-1104 confirms that in some circumstances fiduciary duties not explicitly provided for in the limited liability company agreement apply. Section 18-1101(c) continues to provide that such duties may be expanded, restricted or eliminated by the limited liability company agreement.

The proposed legislation must be first approved by the Corporation Council, then by the Corporation Law Section and finally by the Executive Committee of the Bar Association before it goes to the General Assembly. Our committee would like to see a bill introduced in January.